



MOMIN JURIS LAW

**“Tailoring Secretarial and Compliance
Services Seamlessly”**

COMPANY ACT, 2013

- *Section 114(1)*
- *Section 139(8)*
- *Section 139(1)*
- *Section 147*
- *Rule 3 of Companies (Audit and Auditors) Rules, 2014*

PASSING OF ORDINARY RESOLUTION

In light of section 114(1) of the Companies Act, 2013:

A resolution shall be an ordinary resolution if the notice required under this Act has been duly given and it is required to be passed by the votes cast, whether on a show of hands, or electronically or on a poll, as the case may be, in favour of the resolution, including the casting vote, if any, of the Chairman, by members who, being entitled so to do, vote in person, or where proxies are allowed, by proxy or by postal ballot, **exceed the votes, if any, cast against the resolution by members, so entitled and voting.**

In other words, an ordinary resolution is passed when the number of votes cast in favour exceeds 51% of the total valid votes cast.

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CASUAL VACANCY OF THE AUDITOR DUE TO RESIGNATION

As per Section 139(8) of the Companies Act, 2013:

Any casual vacancy in the office of an auditor shall be filled in the following manner:

- i. in the case of a company other than a company whose accounts are subject to audit by an auditor appointed by the Comptroller and Auditor-General of India, be filled by the Board of Directors **within thirty days**, but if such casual vacancy is as a result of the resignation of an auditor, such appointment shall also be approved **by the company at a general meeting convened within three months of the recommendation of the Board** and he shall hold the office **till the conclusion of the next annual general meeting**.

REAPPOINTMENT OF AUDITOR

As per Section 139(1) of the Companies Act, 2013:

- i. Subject to the provisions of this Chapter, every company shall, at the first annual general meeting, appoint an individual or a firm as an auditor who shall hold office from the conclusion of that meeting **till the conclusion of its sixth annual general meeting** and thereafter till the conclusion of every sixth meeting and the manner and procedure of selection of auditors by the member of the company at such meeting shall be such as may be prescribed:

Provided further that before such appointment is made, the written consent of the auditor to such appointment, and a certificate from him or it that the appointment, if made, shall be in accordance with the conditions as may be prescribed, shall be obtained from the auditor:

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Provided also that the certificate shall also indicate whether the auditor satisfies the criteria provided in section 141:

Provided also that the company shall inform the auditor concerned of his or its appointment, and also file a notice of such appointment with the Registrar **within fifteen days of the meeting in which the auditor is appointed.**

Explanation. —For the purposes of this Chapter, “appointment” includes reappointment.

STEPS REQUIRED TO FILL CASUAL VACANCY OF THE AUDITOR DUE TO RESIGNATION ARE:

- Obtain certificate in writing from the proposed auditor confirming his eligibility to be appointed.
- Convene a Board meeting within 30 days of arising casual vacancy after giving notice to all directors and pass resolution appointing the new auditor in the place of old auditor.
- Inform the auditor so appointed with a certified copy of resolution.
- Issue notice to hold general meeting within 3 months from the date of recommendation of the Board to the members of the company. (In our case we can hold AGM because resignation date of old Auditor is 25.06.2023 we can hold Annual general meeting on 30st September 2023. It depends on which date financials is approved)
- Hold the general meeting and approve the appointment of auditor already made by the Board of directors.
- Inform the Registrar in form ADT-1 with requisite filing fees and annexures.

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APPOINTMENT OF AUDITOR

➤ Applicable Section

- **Section 139(1)** of the Companies Act, 2013
- **Rule 3 of Companies (Audit and Auditors) Rules, 2014**

1. Obtain Written Consent & Eligibility Certificate from Auditor

➤ The proposed auditor must give:

- Consent to act as auditor
- Certificate confirming eligibility under Section 141 (not disqualified)

2. Hold Board Meeting

➤ Agenda:

- **Approve the proposal for appointment of auditor**
- **Fix date, time, and venue of the Annual General Meeting (AGM)**
- **Approve the AGM notice including auditor appointment**

3. Send Notice of AGM to Members

- Notice to include details of proposed auditor (name, firm name, address, qualifications, etc.)
- Should also include **ordinary resolution** for auditor's appointment

4. Hold Annual General Meeting (AGM)

- **Pass an Ordinary Resolution** for the appointment of auditor
- Auditor is appointed from the conclusion of this AGM till the conclusion of the sixth AGM (i.e., 5-year term)

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5. File Form ADT-1 with ROC

- **Must be filed within 15 days of AGM**
- **Attachments:**
 - Certified true copy of Board Resolution
 - Auditor’s consent and eligibility certificate
 - Extract of AGM resolution (if available)
 - Appointment letter

PENALTY

Under Section 147 of the Companies Act, 2013

(1) If any of the provisions of sections 139 to 146 (both inclusive) is contravened, the company shall be punishable with fine which shall **not be less than twenty-five thousand rupees** but which may **extend to five lakh rupees** and every officer of the company who is in default shall be punishable with fine which shall not be less **than ten thousand rupees** but which may **extend to one lakh rupees**.

(2) If an auditor of a company contravenes any of the provisions of section 139, section 144 or section 145, the auditor shall be punishable with fine which shall **not be less than twenty-five thousand rupees** but which may **extend to five lakh rupees or four times the remuneration of the auditor, whichever is less:**

Provided that if an auditor has contravened such provisions knowingly or willfully with the intention to deceive the company or its shareholders or creditors or tax authorities, he shall be punishable with imprisonment for a term which may **extend to one year** and with fine which shall **not be less than fifty thousand rupees** but which may **extend to twenty-five lakh rupees** or eight times the remuneration of the auditor, **whichever is less.**

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(3) Where an auditor has been convicted under sub-section (2), he shall be liable to—

- (i) refund the remuneration received by him to the company; and
- (ii) pay for damages to the company, statutory bodies or authorities or to members or creditors of the company for loss arising out of incorrect or misleading statements of particulars made in his audit report.

(4) The Central Government shall, by notification, specify any statutory body or authority or an officer for ensuring prompt payment of damages to the company or the persons under clause (ii) of sub-section (3) and such body, authority or officer shall after payment of damages to such company or persons file a report with the Central Government in respect of making such damages in such manner as may be specified in the said notification

(5) Where, in case of audit of a company being conducted by an audit firm, it is proved that the partner or partners of the audit firm has or have acted in a fraudulent manner or abetted or colluded in any fraud by, or in relation to or by, the company or its directors or officers, the liability, whether civil or criminal as provided in this Act or in any other law for the time being in force, for such act shall be of the partner or partners concerned of the audit firm and of the firm jointly and severally.

Provided that in case of criminal liability of an audit firm, in respect of liability other than fine, the concerned partner or partners, who acted in a fraudulent manner or abetted or, as the case may be, colluded in any fraud shall only be liable.

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CASE LAW

The Ministry of Corporate Affairs (MCA) has issued an adjudication order against Al-Ameen Mutual Benefit Nidhi Limited for violating Section 139 of the Companies Act, 2013. Al-Ameen Mutual Benefit Nidhi Limited, a registered entity under the Companies Act, was found to be in non-compliance with the statutory requirement of appointing an auditor and filing the necessary forms. Despite notices and opportunities for response, the company failed to rectify the violations, leading to penalties under the provisions of the Companies Act.

Order No. 07/01/ADJ-139/AL-AMEEN/212 to 219 DATED: 09/04/2024.

CONCLUSION

In our case M/s **LA FAMILLI HOTELS AND RESORTS PRIVATE LIMITED** (CIN: U99999MH1997PTC111133) auditor has resigned on 25th June, 2023 Auditor has filed ADT-3. Company needs to comply with Section 139(8) of the Companies Act, 2013 and filed casual vacancy of statutory auditor with prescribed time. Company needs to call board meeting and appoint auditor within 30 days that is before 25th July 2023 and within 3 months or in annual general meeting needs to approve from the shareholder by passing ordinary resolution with 51% members approval and within 15 days from such approval company needs to file ADT-1. Non compliance of this section will impose penalty on company and every officer in default as given in section 147 of the Companies Act, 2013

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